

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of AT&T Corp., Complainant, v. BellSouth Telecommunications, Inc., Defendant.)))))))))))	File No. EB-04-MD-010
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MEMORANDUM OPINION AND ORDER

Adopted: December 8, 2004

Released: December 9, 2004

By the Commission:

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I. INTRODUCTION

1. In this Order, we partially grant and otherwise dismiss or deny the claims alleged in the formal complaint¹ that AT&T Corp. Inc. (“AT&T”) filed against BellSouth Telecommunications, Inc. (“BellSouth”) under section 208 of the Communications Act of 1934, as amended (“the Act”).² Briefly, AT&T’s complaint alleges that two of BellSouth’s optional tariff discount plans for special access services, the Transport Savings Plan (“TSP”) and the Premium Service Incentive Plan (“PSIP”), violate sections 201(b), 202(a), and 272 of the Act³ because they lack cost justification, impede the development of facilities-based competition in the BellSouth region, and discriminate in favor of BellSouth’s interexchange affiliate. We find that BellSouth’s TSP discriminates in favor of BellSouth’s interexchange affiliate, BellSouth Long Distance, Inc. (“BellSouth Long Distance”), in violation of section 272. In light of this finding, and because the remedy we apply under section 272 grants to AT&T all the relief it would be due under sections 201(a) and 202(b), we dismiss without prejudice AT&T’s claims alleging that the TSP violates sections 201(b) and 202(a). In addition, we deny all of AT&T’s claims concerning the PSIP.⁴

II. BACKGROUND

A. The Parties and Market Context

2. AT&T offers telecommunications services, including interexchange and local exchange services.⁵ AT&T purchases special access services from BellSouth.⁶

3. BellSouth is an incumbent local exchange carrier (“incumbent LEC”) and a Bell Operating Company (“BOC”) within the meaning of sections 3(4) and 251(h) of the Act.⁷ BellSouth provides local exchange, exchange access, special access, and other telecommunications services in a nine-state service area.⁸

4. BellSouth Long Distance is a corporate affiliate of BellSouth that provides retail interexchange services.⁹ Created in 1996, BellSouth Long Distance first obtained operational authority under section 271 of the Act, 47 U.S.C. §271, in May 2002.¹⁰ Like AT&T, BellSouth Long Distance

¹Complaint of AT&T Corp. v. BellSouth Telecommunications, Inc., File No. EB-04-MD-010 (filed July 1, 2004) (“Complaint”).

²47 U.S.C. § 208.

³47 U.S.C. §§ 201(b), 202(a), 272.

⁴Pursuant to section 1.731 of the Commission's rules, 47 C.F.R. § 1.731, Commission staff entered a Protective Order limiting the disclosure of sensitive business information that either AT&T or BellSouth designated as confidential (“Confidential Information”). AT&T Corp. v. BellSouth Telecommunications, Inc., File No. EB-04-MD-010, Letter Ruling (July 8, 2004) (“Protective Order”). Pursuant to that Protective Order, this public version of the Memorandum Opinion and Order redacts all Confidential Information that is contained in the confidential version of the Memorandum Opinion and Order, and that redacted Confidential Information appears in the Confidential Appendix. Such redactions are signified herein by bracketed, generic references to Confidential Information.

⁵Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-04-MD-010 (filed Aug. 3, 2004) (“Joint Statement”) at para. 3.

⁶*Id.*

⁷47 U.S.C. §§ 153(4), 251(h); Joint Statement at para. 4.

⁸*Id.*

⁹*Id.*

¹⁰See, e.g., www.bellsouth.com/longdistance/history.html; Joint Application by BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Memorandum Opinion and Order, 17 FCC Rcd 9018 (2002).

purchases special access services from BellSouth and uses those services as inputs for its retail interexchange services.¹¹

5. Special access is a service that provides a dedicated connection between two points.¹² Special access customers run the gamut from telecommunications carriers and information service providers to all types of businesses in every segment of the economy.¹³ For example, special access is purchased (by end user customers or by interexchange carriers) to connect end user locations that generate large volumes of long distance traffic to an interexchange carrier's network.¹⁴ Similarly, special access is purchased by wireless carriers to connect their radio towers to their mobile switching centers, and by various carriers to connect their networks to particular tandem or end office switches on the incumbent carrier's network.¹⁵ Special access is also purchased by Internet service providers, other information service providers, and end user customers to obtain dedicated connections between specific points.¹⁶

6. AT&T and its interexchange and local exchange competitors purchase special access to facilitate their provision of retail communications services.¹⁷ Certain retail data and voice services that AT&T provides to large and medium-sized enterprises, and long distance voice services that AT&T provides to small businesses and residential consumers, use BellSouth's special access services.¹⁸ AT&T also purchases special access from BellSouth to provide retail voice and other services as a local carrier to businesses and consumers.¹⁹ End users, including AT&T, also purchase BellSouth's special access services for their own telecommunications requirements.²⁰

7. BellSouth provides its interstate special access services pursuant to its Tariff FCC No. 1.²¹ In addition to its basic rates for special access services, BellSouth offers various optional discount plans to customers that are willing to make various commitments with respect to their purchases of BellSouth's special access services.²² One such plan is the Transport Savings Plan, *i.e.*, the TSP.

B. The Transport Savings Plan – History and Operation

8. BellSouth filed the TSP on March 22, 1999.²³ Although AT&T and MCI WorldCom ("MCI") both objected to the TSP,²⁴ Commission staff found that their objections did not "present[]

¹¹Joint Statement at para. 4.

¹²*Id.* at para. 6. In this proceeding, "special access services" includes dedicated switched transport services, which are deployed when an interexchange carrier connects its points of presence to a LEC end office switch or tandem switch. *Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at para. 7.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹*Id.* at para. 8.

²²*Id.*

²³*Id.* at para. 15; BellSouth Telecommunications, Inc.'s Answer to AT&T Corp.'s Formal Complaint, File No. EB-04-MD-010 (filed July 21, 2004) ("BellSouth Answer") at Tab 3, Attachment B, BellSouth Transmittal No. 495.

²⁴Joint Statement at para. 25. MCI challenged one section of Transmittal No. 495, a "growth" discount provision, while AT&T challenged the entire filing, arguing that BellSouth had not provided sufficient cost support. BellSouth Answer at Tab 3, Attachments C, D. AT&T asserted that the cost support provided by BellSouth -- two worksheets alleged to demonstrate that the discount rates would not produce below-cost prices -- did not adequately support the

(continued....)

compelling arguments that [the] transmittal [] [is] so patently unlawful as to require rejection,”²⁵ and the TSP became effective April 6, 1999, without suspension or investigation.²⁶

9. The TSP is an optional tariff volume discount plan for special access services.²⁷ It is primarily an “overlay” plan, meaning that it may function in combination with other BellSouth special access discount plans, and provides incremental discounts beyond those available under those other plans.²⁸ Except for the PSIP, the TSP is BellSouth’s only special access plan that offers volume discounts.²⁹

10. The discount level of the TSP varies according to two factors: the customer’s volume (or revenue) band, and the year in the plan.³⁰ For example, a customer whose Committed Volume Level is in the \$3 million - \$10 million revenue band (the lowest volume band) earns a discount of 1% in the first year of its TSP term (to a maximum of 3% in year 5 and any extension year), while a customer whose Committed Volume Level is in the \$500 million - \$600 million revenue band earns a discount of 5% in the first year of its TSP term (to a maximum of 12% in the fifth of its five years and any extension year), above and beyond the discounts earned in other BellSouth (non-volume-based) plans.³¹ The TSP’s discounts apply not just to the Committed Volume Level, but also to any eligible purchases above that Level.³²

11. In order to qualify for the TSP, a customer initially had to agree to commit for five years to buy special access services from BellSouth in annual amounts equal to at least 90% of its purchases from BellSouth in the six months immediately prior to its subscription to the plan, annualized (the customer’s “Committed Volume Level”).³³ If the customer does not meet its Committed Volume Level

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proposed discount plans. Under special permission, before the TSP became effective, BellSouth struck the section of the TSP to which MCI had objected. BellSouth Answer at Tab 3, Attachment E.

²⁵*Protested Tariff Transmittals Action Taken*, Public Notice, 14 FCC Rcd 6199 (Com. Carr. Bur.-Comp. Pr. Div. 1999) (“*TSP Public Notice*”).

²⁶Joint Statement at para. 15.

²⁷*Id.* at para. 16.

²⁸*Id.* At the time that the TSP was introduced, BellSouth had in place three optional payment and savings discount plans for its special access customers, and these plans continued in place: the Area Commitment Plan (“ACP”); the Channel Services Payment Plan (“CSPP”); and the Transport Payment Plan (“TPP”). All three of these plans are still available to current and new customers. Joint Statement at paras. 9-14.

²⁹*Id.* at paras. 16, 38.

³⁰The TSP’s revenue bands are from \$3 million to \$10 million (with discounts ranging from 1% in the first year to 3% in the fifth); from \$10 million to \$100 million (with discounts ranging from 2% to 5%); from \$100 million to \$300 million (with discounts ranging from 3% to 9%); from \$300 million to \$500 million (with discounts ranging from 4.5% to 10%); from \$500 million to \$600 million (with discounts ranging from 5% to 12%); and above \$600 million (with discounts ranging from 5.5% to 12.5%). Complaint, Tab H (citing BellSouth Tariff FCC No. 1 at section 2.4.8(E)(7)(b)). As just indicated, the discount levels increase within each band over time, and between bands, so a TSP customer can increase its discount just by staying in the plan, and can increase it still more by voluntarily raising its Committed Volume Level above the ceiling of its current band. Joint Statement at para. 21; Complaint Tab H, BellSouth Tariff FCC No. 1, section 2.4.8 (E)(7).

³¹Joint Statement at para. 21.

³²*Id.*; Complaint Tab H, BellSouth Tariff FCC No. 1, section 2.4.8 (E)(8).

³³Joint Statement at para. 17. The customer could also commit to a particular revenue band amount, as long as that amount was 90% or more of its historic expenditure with BellSouth. *Id.* Most, but not all, of BellSouth’s special access services are eligible for inclusion in the TSP. Joint Statement at para. 16. Revenues generated by a customer’s purchase of TSP-eligible special access services, plus some additional specified low-volume services, are called “qualifying revenues.” Joint Statement at para. 21; BellSouth Answer, Tab 3, Declaration of Greg Mims (“Mims Declaration”) at para. 37.

in a particular period, it must pay certain shortfall charges;³⁴ if it leaves the TSP before the plan's scheduled end, the customer must pay certain termination charges.³⁵ At the end of the five-year term, TSP customers have the option to invoke the "evergreen" provision and extend the TSP in one-year increments,³⁶ which enables them to continue the plan perpetually. A customer extending for another year must maintain or increase its Committed Volume Level.³⁷

12. The TSP allows a customer to adjust its Committed Volume Level upward but not downward.³⁸ As originally filed, however, the TSP permitted a customer the possibility of establishing a lower Committed Volume Level by (i) terminating its subscription early or allowing its 5-year term to lapse; (ii) waiting six months; (iii) re-subscribing to the TSP, and (iv) obtaining a new Committed Volume Level, based on the greater of 90% of its qualifying revenues or its selected volume band.³⁹ As discussed below,⁴⁰ BellSouth subsequently amended the TSP to eliminate that possibility.

13. [Confidential Information regarding the identity, number, and relative size of TSP subscribers, including AT&T and BellSouth Long Distance].

14. [Confidential Information regarding AT&T's Committed Volume Level and the timing of AT&T's TSP subscribership].

15. BellSouth Long Distance subscribed to the TSP beginning April 19, 2001.⁴¹ Within a matter of months, BellSouth Long Distance upgraded its Committed Volume Level to \$10 million on October 23, 2001.⁴²

16. On June 24, 2004, BellSouth filed an amendment to the TSP that closed the plan to new subscribers.⁴³ Under this amendment, current TSP customers may continue in the TSP through the remainder of their terms, and may continue indefinitely to extend their subscriptions in one-year increments at their current Committed Volume Levels or higher.⁴⁴ Current customers, however, can no

³⁴Joint Statement at para. 18; Complaint Tab H, BellSouth Tariff FCC No. 1, section 2.4.8 (E)(8).

³⁵Mims Declaration at para. 34; Complaint Tab H, BellSouth Tariff FCC No. 1, section 2.4.8 (E)(10).

³⁶Joint Statement at para. 18. This "evergreen" provision was added in December 2001. *Id.* at para. 30; Complaint Tab H, BellSouth Tariff FCC No. 1 section 2.4.8 (E)(4); Mims Declaration at para. 84; BellSouth's Reply Brief, File No. EB-04-MD-010 (filed Oct. 4, 2004) ("BellSouth Reply Brief") at 28.

³⁷Joint Statement at para. 18; Complaint Tab H, BellSouth Tariff FCC No. 1, section 2.4.8 (E)(6).

³⁸Joint Statement at paras. 17, 19.

³⁹Complaint Tab H, BellSouth Tariff FCC No. 1, sections 2.4.8 (E)(1), (4), and (10) (the current tariff, as modified in June 2004); Answer Tab 9 B, BellSouth Tariff FCC No. 1, section 2.4.8 (E)(11) (the tariff as filed March 22, 1999); Complaint at 36; Complaint Tab G, Affidavit of John W. Mayo on Behalf of AT&T Corp. ("Mayo Affidavit") at para. 67; AT&T Initial Brief at 111, 135. Such a customer would also return to the lower, first-year discount levels, and work its way to higher discounts over the course of the new five-year term. Mims Declaration at para. 84; BellSouth Reply Brief at 28.

⁴⁰See discussion, *infra*, at para. 16.

⁴¹See www.bellsouthcorp.com/policy/transactions/tariffsum.vtml, cited in AT&T Supplemental Filing in Response to Commission Notice of Formal Complaint of AT&T, File No. EB-04-MD-010 (filed July 13, 2004) ("AT&T Supplement"), Tab P, Supplemental Affidavit of Jeffrey C. Huels in Support of Formal Complaint of AT&T Corp. ("Huels Supplemental Affidavit") at 2; Mims Declaration at Attachment G; BellSouth Telecommunications, Inc.'s Responses to AT&T Corp.'s First Set of Interrogatories, EM-04-MD-010 (filed Aug. 27, 2004) ("BellSouth Interrogatory Response") No. 4 at Tab A, page 2.

⁴²Mims Declaration at Attachment G; BellSouth Interrogatory Response No. 4, Tab A at 2.

⁴³Joint Statement at para. 51; AT&T Supplement, Tab 8, BellSouth Transmittal No. 829, filed June 23, 2004, effective June 24, 2004. BellSouth's tariff amendment closed both the TSP and the PSIP (which BellSouth had filed just three months earlier, on March 20, 2004) to new subscribers. Joint Statement at para. 36.

⁴⁴Joint Statement at para. 51.

longer allow their terms to lapse, wait six months, and re-subscribe at a lower Committed Volume Level.⁴⁵

C. AT&T's Complaint

17. On July 1, 2004, AT&T filed the instant Complaint. In brief, AT&T alleges that: (1) the TSP is unlawfully discriminatory, in violation of section 272 of the Act, because it provides volume discounts to BellSouth Long Distance that are neither cost-based nor proportional to the discounts available to BellSouth Long Distance's larger competitors;⁴⁶ (2) the TSP is unjust and unreasonable, in violation of section 201(b) of the Act, because it facilitates anticompetitive conduct and non-market-based pricing;⁴⁷ and (3) the TSP discriminates unreasonably, in violation of section 202(a) of the Act, because it unreasonably restricts the availability of volume discounts, offers different prices and terms for like services without reasonable justification, and unreasonably seeks to improve the competitive position of smaller carriers.⁴⁸

III. DISCUSSION

A. BellSouth's TSP Violates Sections 272(c)(1) and 272(e)(3) of the Act by Discriminating in Favor of BellSouth Long Distance.

18. AT&T alleges that BellSouth's TSP violates sections 272(c)(1) and 272(e)(3) of the Act by discriminating in favor of BellSouth's interexchange affiliate, BellSouth Long Distance.⁴⁹ To support its allegations, AT&T relies on BellSouth's own description of the operation and purposes of the TSP.⁵⁰ Specifically, BellSouth states that the TSP was designed and operates to provide to relatively low-volume customers, including BellSouth Long Distance, larger discounts than would be available under a plan whose discounts were more closely proportional to volume; concomitantly, BellSouth states that the TSP was designed and operates to provide to relatively high-volume customers, including AT&T, smaller discounts than would be available under a plan whose discounts were more closely proportional to volume.⁵¹ In AT&T's view, these BellSouth statements prove that the TSP creates a "class of favored

⁴⁵*Id.* BellSouth FCC Tariff No. 1, sections 2.4.8 (E)(1) and (10). See Complainant's Initial Brief, File No. EB-04-MD-010 (filed Sept. 22, 2004) ("AT&T Initial Brief") at 134-35; Complainant's Reply Brief, File No. EB-04-MD-010 (filed Oct. 4, 2004) ("AT&T Reply Brief") at 6; BellSouth Reply Brief at 28.

⁴⁶Complaint at 4-6, 8-9, 28, 55-62, 65-67; Complaint at Tab C, Affidavit of Stephen G. Huels in Support of AT&T Corp. ("Huels Affidavit") at paras. 34-35; Complaint at Tab G, Mayo Affidavit at paras. 5-6, 11, 20, 51-52; Complainant AT&T's Reply to Defendant BellSouth's Answer, File No. EB-04-MD-010 (filed July 26, 2004) ("Reply") at 2-3, 12, 13-14 & n.52, 15-16, 37-40, 42-43; AT&T Initial Brief at 4, 11-12, 49 & n.174, 54-55, 140-44, 148, 156-63; AT&T Reply Brief at 3, 58, 72-76.

⁴⁷Complaint at 27-54; Reply at 6-20; AT&T Initial Brief at 87-127; AT&T Reply Brief at 9-49.

⁴⁸Complaint at 4-6, 8-9, 28, 55-62, 65-67; Huels Affidavit at paras. 34-35; Mayo Affidavit at paras. 5-6, 11, 20, 51-52; Reply at 12, 13-14 & n.52, 15-16, 37-40, 42-43; AT&T Initial Brief at 4, 11-12, 49 & n.174, 54-55, 140-44, 148, 156-63; AT&T Reply Brief at 58, 72-76.

⁴⁹Complaint at 4-6, 8-9, 28, 55-62, 65-67; Huels Affidavit at paras. 34-35; Mayo Affidavit at paras. 5-6, 11, 20, 51-52; Reply at 12, 13-16, 37-38, 40-44; AT&T Initial Brief at 11-12, 49, 54-56, 140-44, 148, 156-63; AT&T Reply Brief at 58, 72-76.

⁵⁰Complaint at 4-6, 8-9, 28, 55-62, 65-67; Huels Affidavit at paras. 34-35; Mayo Affidavit at paras. 5-6, 11, 20, 51-52; Reply at 2-3, 12, 13-14 & n.52, 15-16, 37-38, 40-44; AT&T Initial Brief at 4, 11-12, 49 & n.174, 54-55, 140-144, 148, 156-63; AT&T Reply Brief at 3, 58, 72-76.

⁵¹BellSouth Answer at 2, 17, 19-20, 66-69, 72; BellSouth Answer, Tab 2, Legal Analysis ("BellSouth Legal Analysis") at 2-3, 18-20, 65-69, 73; Mims Declaration at paras. 28, 35, 44-46, 48-51, 72, 78-80; BellSouth's Initial Brief, EB-04-MD-010 (filed Sept. 22, 2004) ("BellSouth Initial Brief") at 32-33, 35-36, 39, 44-45, 48-51, 57-62, 70, 105; BellSouth Reply Brief at 8-9, 30-35, 37-38, 53-56; BellSouth Interrogatory Response No. 1 at 2-3; BellSouth Interrogatory Response No. 4, Attachment A.

customers” that includes BellSouth Long Distance, in violation of section 272.⁵² For the following reasons, we agree with AT&T.

19. Section 272 provides, in pertinent part:

272(c)(1): In its dealings with its affiliate . . . a Bell operating company . . . may not discriminate between that . . . affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.⁵³

272(e)(3): [A Bell operating company] shall charge [its] affiliate . . . or impute to itself . . . an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service.⁵⁴

The Commission has discussed and interpreted section 272 in a way that provides significant clarity here.⁵⁵ As its plain language indicates, section 272 “establishes an unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities.”⁵⁶ In fact, section 272 “impos[es] a flat prohibition against discrimination more stringent than the bar on ‘unjust and unreasonable’ discrimination contained in section 202 of the Act. In short, the BOCs must treat all other entities in the same manner in which they treat their section 272 affiliates.”⁵⁷ In other words, section 272

⁵²AT&T Reply Brief at 74. See Complaint at 8, 28; Reply at 12, 14, 40-43; Reply at Tab A, Reply Affidavit of John W. Mayo on Behalf of AT&T Corp. (“Mayo Reply Affidavit”) at paras. 20-21, 48-50; AT&T Initial Brief at 156-63; AT&T Reply Brief at 72-76.

⁵³47 U.S.C. § 272(c)(1).

⁵⁴47 U.S.C. § 272(e)(3). We note that neither party has argued that sections 272(c)(1) and (e)(3) impose different substantive prohibitions, at least as applied to volume discount plans. Further, as the discussion in this section demonstrates, the relevant Commission precedent calls into question discount plans that favor a BOC affiliate under both 272(c)(1) and (e)(3). Accordingly, our conclusions that the TSP is unlawful arise under both section 272(c)(1) and section 272(e)(3).

⁵⁵See, e.g., *Joint Application by BellSouth Corp., BellSouth Telecommunications Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLata Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, Memorandum Opinion and Order, 17 FCC Rcd 17595, 17748-50 (2002) (“*BellSouth 5-State Order*”); *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14288-91 (1999) (“*Pricing Flexibility Order*”) (subsequent history omitted); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Second Order on Reconsideration, 12 FCC Rcd 8653, 8657-58, 8663 (1997) (“*Non-Accounting Safeguards Recon. Order*”) (subsequent history omitted); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 21905 (1996) (“*Non-Accounting Safeguards Order*”) (subsequent history omitted); *Access Charge Reform*, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354, 21435-38 (1996) (“*Access Charge Reform Order*”) (subsequent history omitted). Regarding Commission policy on volume discounts in general, see *Transport Rate Structure and Pricing*, Fourth Order and Order on Reconsideration, 10 FCC Rcd 12979, 12979-86 (1995) (“*Fourth Transport Rate Order*”) (addressing the propriety of volume and growth discounts under sections 201(b) and 202(a)); *Expanded Interconnection with Local Telephone Company Facilities, Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7412-15 (1992) (“*Expanded Interconnection Order*”) (same) (subsequent history omitted).

⁵⁶*Non-Accounting Safeguards Order*, 14 FCC Rcd at 22200, para. 197 (discussing section 272(c)(1)).

⁵⁷*Non-Accounting Safeguards Order*, 14 FCC Rcd at 21914, para. 16. See *id.* at 20999, para. 197 (discussing section 272(c)(1) and stating that “Congress did not intend section 272’s prohibition against discrimination in the 1996 Act to be synonymous with the ‘unjust and unreasonable’ discrimination language used in the 1934 Act, but rather, intended a more stringent standard.”).

requires, “at a minimum,” that the BOC “must provide to unaffiliated entities the same goods, services, facilities, and information it provides to its section 272 affiliate at the same rates, terms, and conditions.”⁵⁸ The Commission further recognizes that even a facially neutral practice may have an unlawfully discriminatory impact under section 272. For example, “a BOC may have an incentive to offer tariffs that, while available on a nondiscriminatory basis, are in fact tailored to its affiliate’s specific size, expansion plans, or other needs.”⁵⁹

20. Applying those principles to volume and term discounts, the Commission has concluded that a BOC may offer such discounts to its interexchange affiliate, as long as the BOC makes such discounts “available on a nondiscriminatory basis to all unaffiliated interexchange carriers.”⁶⁰ That is because “price differences, such as volume and term discounts, *when based upon legitimate variations in cost*, are permissible. . . .”⁶¹ Accordingly, a BOC accused of offering a volume discount that allegedly violates section 272 “may demonstrate, among other things, that rate differentials between the section 272 affiliate and unaffiliated entity reflect differences in cost. . . . [W]here costs differ, rate differences that accurately reflect those differences are not unlawfully discriminatory.”⁶²

21. AT&T’s allegations that BellSouth’s TSP violates section 272 fall into two general areas: (i) the discount levels themselves discriminate in favor of BellSouth Long Distance, and (ii) the 90% commitment requirement discriminates in favor of BellSouth Long Distance. We consider each of these allegations below.

1. The TSP’s disproportional discounts discriminate in favor of BellSouth Long Distance, in violation of section 272.

22. In general, the Commission has looked favorably upon tariffed volume discount plans where, as for special access services, volume and cost appear to have a fairly direct, inverse relationship that reflects the economies and efficiencies gained as volumes increase.⁶³ Accordingly, the volume

⁵⁸*Non-Accounting Safeguards Order*, 14 FCC Rcd at 22201, para. 202 (discussing section 272(c)(1)). Congress deliberately made section 272’s anti-discrimination requirements unusually stringent in order “to effectuate the goal of preventing anticompetitive abuses by BOCs that control essential local facilities and seek to enter competitive markets that require these facilities as an input.” *Non-Accounting Safeguards Recon. Order*, 12 FCC Rcd at 8657-58, para. 10.

⁵⁹*Non-Accounting Safeguards Order*, 14 FCC Rcd at 22028-29, para. 257 (discussing section 272(e)(3)). See *BellSouth 5-State Order*, 17 FCC Rcd at 17748, para. 272; *Pricing Flexibility Order*, 14 FCC Rcd at 14294, para. 135; *Access Charge Reform Order*, 11 FCC Rcd at 21437, para. 192; *Transport Rate Structure and Pricing*, Third Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 3030, 3083 at para. 114 (1994) (“*Transport Rate Order*”) (subsequent history omitted).

⁶⁰*Non-Accounting Safeguards Order*, 14 FCC Rcd at 22028-29, para. 257 (discussing section 272(e)(3)).

⁶¹*Id.* at 22204-05, para. 212 (discussing section 272(c)(1) and quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15928, at para. 860 (1996) (“*First Interconnection Order*”) (emphasis added)).

⁶²*Non-Accounting Safeguards Order*, 14 FCC Rcd at 22204-05, para. 212.

⁶³See, e.g., *Access Charge Reform Order*, 11 FCC Rcd at 21435, para. 187 (“[Volume and term] discounts should be permitted . . . because they encourage efficiency and full competition”); *Fourth Transport Rate Order*, 10 FCC Rcd at 12984, para. 13 (citing *Expanded Interconnection Order*, 7 FCC Rcd 7369 at 7463, para. 199 (recognizing “both volume and term discounts as generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships”)); *Price Cap Local Exchange Carrier Performance Review*, First Report and Order, 10 FCC Rcd 8961, 9042-43 at para. 417 (1995) (“*LEC Performance Review Order*”); *Transport Rate Order*, 10 FCC Rcd at 3078-79, 3083, paras. 105, 114 (noting that acceptable volume discounts grant “reduced per-unit prices for a particular number of units of

(continued....)

discounts contained in typical federal tariffs are significantly linear, *i.e.*, the discounts rise in close proportion to the rise in volume, reflecting the ever-diminishing per-unit costs of providing service in increasingly higher volumes.⁶⁴

23. BellSouth points out that the TSP is not a typical, proportional volume discount plan.⁶⁵ Specifically, BellSouth asserts that it designed the TSP's discounts to be somewhat *disproportional* to volume, in order to achieve BellSouth's stated goal of providing more substantial discounts to a broader range of BellSouth's customers than would be possible under a proportional volume discount plan; this, in turn, enhances the competitiveness of smaller carriers more than a proportional volume discount plan would do.⁶⁶ As a result, the relationship of the TSP's discounts to volume is far from linear, and the discounts skew substantially in favor of relatively low-volume customers, such as BellSouth Long Distance, and substantially against relatively high-volume customers, such as AT&T and [Confidential Information identifying another TSP customer].⁶⁷

24. BellSouth quantifies this skewing effect by comparing the discounts provided by the TSP with the discounts that would be provided by a proportional volume and term discount plan.⁶⁸ For example, as shown in the table below, comparing the TSP's fifth-year discounts with discounts calculated under a more directly proportional plan, the TSP discount is 43 times higher (3.0% versus .07%) for volumes of \$3 million - \$10 million; some 21 times higher (5% versus .24%) for volumes of \$10 million - \$100 million ([Confidential Information regarding specific TSP customer]); almost four times higher (9.0% versus 2.40%) for volumes of \$100 million - \$300 million; about a third higher (10.0% versus 7.2%) for volumes of \$300 million - \$500 million; and some 15% *lower* (12.5% versus 14.4%) for volumes over \$600 million.⁶⁹

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service"); *Private Line Rate Structure and Volume Discount Practices*, Report and Order, 97 F.C.C. 2d 923, 947, 948 at paras. 38, 40 (1984) ("*Volume Discount Order*").

⁶⁴See, e.g., *Pricing Flexibility Order*, 14 FCC Rcd at 14288-89, paras. 123-24; *Access Charge Reform Order*, 11 FCC Rcd at 21437, para. 190; *Fourth Transport Rate Order*, 10 FCC Rcd at 12979-86; *Transport Rate Order*, 10 FCC Rcd at 3093, para. 141; *Expanded Interconnection Order*, 7 FCC Rcd at 7463, paras. 199-200.

⁶⁵See, e.g., BellSouth Answer at 2, 17, 19-20, 66-69, 72; BellSouth Legal Analysis at 2-3, 18, 66-69; Mims Declaration at paras. 28, 35, 44-46, 48-51, 72, 78-80; BellSouth Initial Brief at 32-33, 35-36, 39, 44-45, 48-51, 59-62, 70, 105; BellSouth Reply Brief at 8-9, 33-35, 53-56; BellSouth Interrogatory Response No. 1 at 2-3; BellSouth Interrogatory Response No. 4.

⁶⁶See, e.g., BellSouth Answer at 2, 17, 19-20, 66-69, 72; BellSouth Legal Analysis at 2-3, 19, 66-69; Mims Declaration at paras. 28, 35, 44, 45, 46 (stating that "the discounts had to be significant enough to avoid undercutting [smaller customers'] competitiveness"), 48-51, 72, 78-79, 80 (stating that the TSP offers "economically rational volume-based marginal discounts [that] . . . provid[e] attractive discounts to the vast majority of BellSouth's special access customers."); BellSouth Initial Brief at 32-33, 35-36, 39, 44-45, 48-51, 57-62, 70, 105; BellSouth Reply Brief at 8-9, 30-35, 37-38, 53-56; BellSouth Interrogatory Response No. 1 at 2-3; BellSouth Interrogatory Response No. 4, Attachment A.

⁶⁷BellSouth Answer at 2, 17, 19-20, 66-69, 72; BellSouth Legal Analysis at 2-3, 18-20, 48-49, 65-69, 73; Mims Declaration at paras. 28, 35, 44-46, 48-51, 72, 78-80; BellSouth Initial Brief at 32-33, 35-36, 39, 44-45, 48-51, 57-62, 70, 105; BellSouth Reply Brief at 8-9, 30-31, 32-33, 33-35, 37-38, 53-56; BellSouth Interrogatory Response No. 1 at 2-3; BellSouth Interrogatory Response No. 4, Attachment A.

⁶⁸Mims Declaration at para. 50.

⁶⁹*Id.* These figures flow from holding constant the discount level for the \$500 million - \$600 million band and calculating the discount levels for all other bands on a basis that is strictly proportional to volume. *Id.*

Comparison of Discount Levels⁷⁰

Customer size (in eligible revenues)	under TSP (year 5)	under proportional volume discount plan
\$3 - \$10 million	3%	0.07%
\$10 - \$100 million	5%	0.24%
\$100 - \$300 million	9%	2.40%
\$300 - \$500 million	10%	7.20%
\$500 - \$600 million	12%	12.00%
over \$600 million	12.5%	14.40%

25. These substantial boosts to the discount levels available to relatively small carriers under the TSP benefit such carriers not only in absolute terms, but also in relation to their larger competitors. Specifically, the discount percentages available to relatively small carriers are much closer in amount to the discount percentages available to relatively large carriers.⁷¹ For example, under a more proportional discount plan, a carrier with volume in the \$10 million - \$100 million range would receive a discount (in the fifth year) of 0.24%, which is almost 12 percentage points less than (or 1/50 of) the discount a carrier with volume in the \$500 million - \$600 million range would receive, *i.e.*, 12%. By contrast, under the TSP, that same small carrier receives a discount (in the fifth year) of 5%, which is only 7 percentage points less than (or almost 1/2 of) the discount received by the large carrier, *i.e.*, 12%.⁷² Thus, the TSP favors relatively small carriers by substantially reducing the "discount differential" between small and large carriers that would occur in a closely proportional volume discount plan.⁷³

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.* Put differently, the difference between the discount for a carrier in the \$500 million - \$600 million band and the discount for a carrier in the \$10 million - \$100 million band would be about twenty times larger under a proportional volume discount plan than it is under TSP. (Under TSP, the larger carrier's discount is only about 2 1/2 times larger than the smaller carrier's; under a proportional discount plan, the larger carrier's discount would be 50 times larger than the smaller carrier's.) [Confidential Information regarding specific TSP customers' volume bands has been redacted from this footnote.]

⁷³[Confidential Information regarding specific TSP customers' volume bands has been redacted from the text above and from this footnote.] As suggested by the text above, by "discount differential," we mean the spread of percentage points between the discounts available in different volume bands. For example, in the TSP, the \$3 million - \$10 million volume band has a 3% discount in the fifth year, and the \$10 million - \$100 million band has a 5% discount, so the "discount differential" is two percentage points. Comparing the complete set of discount differentials reveals the following: As compared to what the discount differentials would be in the fifth year under a more directly proportional plan, the TSP's discount differential is (i) about 33% less (9 percentage-point differential versus 11.93 percentage-point differential) as between a \$3 million - \$10 million customer and a \$500 million - \$600 million customer; (ii) about 40% less (7 percentage-point differential versus 11.76 percentage-point differential) as between a \$10 million - \$100 million customer and a \$500 million - \$600 million customer; (iii) about 70% less (3 percentage-point differential versus 9.6 percentage-point differential) as between a \$100 million - \$300 million customer and a \$500 million - \$600 million customer; (iv) about 60% less (2 percentage-point differential versus 4.8 percentage-point differential) as between a \$300 million - \$500 million customer and a \$500 million - \$600 million customer; and (v) about 500% *more* (1/2 percentage-point differential versus 2.4 percentage-point differential) as between a customer in the over-\$600 million band and a customer in the \$500 million - \$600 million band. Mims Declaration at para. 50.

26. Moreover, the TSP's volume band structure increases its discriminatory impact. The TSP's relatively narrow bands at lower volumes, and relatively wide bands at higher volumes, particularly serve to benefit a quickly growing customer such as BellSouth Long Distance.⁷⁴ In addition, the TSP's relatively wide volume bands at higher volumes render its discounts even less reflective of any volume-based cost differences. For example, a carrier with a little over \$100 million in volume receives the same discount as a carrier with almost three times that volume (*i.e.*, almost \$300 million). Thus, as compared to a volume discount plan more reflective of cost differences, the TSP's wide "stair-steps" favor smaller carriers over larger carriers within the same wide bands (and [Confidential Information identifying a potential customer in this band]).⁷⁵

27. In sum, the TSP accomplishes exactly what BellSouth states it was designed to do: it provides relatively low-volume customers, such as BellSouth Long Distance, with far greater discounts than would be available under a strictly proportional plan, both in absolute terms and in comparison to the discounts provided to relatively high-volume customers, such as AT&T. In turn, as BellSouth acknowledges, the TSP enhances the competitiveness of relatively low-volume customers, such as BellSouth Long Distance, vis-à-vis relatively high-volume customers, such as AT&T.

28. BellSouth proffers no cost justification for the non-proportional relationship between the TSP's discounts and the volumes to which those discounts apply. In particular, BellSouth does not argue that its costs decrease in anything other than fairly close proportion to increases in volume, or that its savings rise with increases in volume at low levels, then dip (or rise more slowly) as volumes increase further. BellSouth simply asserts, instead, that the TSP's substantial departure from the typical, proportional volume discount structure is a reasonable means to achieve laudable goals: spreading "meaningful" discounts across its entire customer base,⁷⁶ and "leveling the playing field" a bit.

29. BellSouth's own description of the operation of the TSP reveals the TSP's unlawfulness under section 272 of the Act. The TSP's discounts substantially favor BellSouth Long Distance and substantially disfavor BellSouth Long Distance's larger competitors in a manner that appears to lack any cost basis. Section 272 "flatly" forbids such discrimination.

30. According to BellSouth, in other contexts, the Commission and courts have found practices that favored smaller customers to be reasonable.⁷⁷ BellSouth's assertion, even if accurate,⁷⁸ is

⁷⁴See AT&T Initial Brief at 77-78; AT&T Reply Brief at 75 (observing that the TSP's band structure "particularly serves to benefit a quickly growing customer such as BellSouth Long Distance").

⁷⁵See BellSouth Interrogatory Response No. 4, Tab A.

⁷⁶BellSouth Answer at 2, 17, 19-20, 66-69, 72; BellSouth Legal Analysis at 2-3, 67-69; Mims Declaration at paras. 28, 35, 44-46, 48-51, 72, 78-80; BellSouth Initial Brief at 32-33, 35-36, 39, 44-45, 48-51, 59-62, 70, 105; BellSouth Reply Brief at 8-9, 33-35, 53-56; BellSouth Interrogatory Response No. 1 at 2-3; BellSouth Interrogatory Response No. 4, Attachment A. In fact, although BellSouth argues that the TSP is structured to help BellSouth retain its customers' business, and that this constitutes a form of "cost justification," it also acknowledges that this is the main aim of any volume and term discount plan. Mims Declaration at para. 49.

⁷⁷BellSouth Initial Brief at 61-62 (citing *Private Line Rate Structure and Volume Discount Practices*, Report and Order, 97 F.C.C. 2d 923, 948 (1984) ("*Volume Discount Order*"); *BellSouth 5-State Order*, 14 FCC Rcd at 13440, paras. 12-13; *First Interconnection Order*, 11 FCC Rcd at 15971, para. 953; *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 192 (1st Cir. 1996)); BellSouth Answer, Tab 2, Legal Analysis, at 44-45 (citing *NYNEX Mobile Communications Co.*, Memorandum Opinion and Order, 12 FCC Rcd 22280, 22288 at para. 16 (1997) ("*NYNEX Mobile*").

⁷⁸We note that, in other contexts, courts have disallowed actions that favored "minnows over trout." See *U.S. v. Western Electric Co., Inc.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (upholding the district court's denial of a waiver of the MFJ's line-of-business restrictions, even though granting such a waiver might have assisted small interexchange carriers to compete against AT&T and MCI); *Competitive Telecommunications Assn' v FCC*, 87 F.3d 522, 531-32

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irrelevant in the unique context of section 272. As previously stated, section 272 imposes an “unqualified prohibition” on BOC discrimination that favors the BOC’s affiliate, regardless of whether the discrimination is arguably reasonable.⁷⁹ Likewise, the fact that several relatively small customers other than BellSouth Long Distance also benefit from the TSP’s skewed discounts does not shield the TSP from section 272’s reach;⁸⁰ section 272’s prohibition on discrimination favoring a BOC affiliate is “flat,” “unqualified,” and “stringent,” and thus permits no exception for conduct that happens to benefit certain non-affiliates, as well.⁸¹ Similarly, the fact that BellSouth Long Distance has, thus far, received far fewer dollars in TSP discounts than many other carriers⁸² is beside the point. The point under section 272 is that BellSouth Long Distance has received far more than a *de minimis* dollar amount in discounts above what it would have received in the absence of the TSP’s discriminatory rates; and, but for our ruling today, the difference between the total amount of discount dollars received by BellSouth Long Distance and the total amount received by its larger competitors would surely shrink over time, as BellSouth Long Distance’s volumes and time of participation in the plan grew – even assuming those larger competitors could maintain their participation in the TSP.

31. Finally, we reject BellSouth’s assertion that, as long as the TSP provides higher discounts for higher volumes, the discounts need not be closely proportional to volume, because the TSP allegedly serves reasonable business goals.⁸³ BellSouth argues that the Commission should not unduly straight-jacket carriers’ flexibility to devise volume discounts to meet the particular competitive needs of specific markets.⁸⁴ In BellSouth’s words, “[i]t cannot be the case...that Section 272 imposes a blanket, strict cost justification standard on volume discounts, prohibiting BOCs in every instance from softening the advantage they confer on larger customers, simply because the BOC affiliate falls within the class of customers who benefit from a departure from strictly linear discounts.”⁸⁵

32. BellSouth’s argument that section 272 does not require strict linear proportionality has some force. Here, however, our determination that the TSP violates section 272 rests on more than just the absence of strictly proportional discounts. Specifically, on these facts, we find that: (i) when challenged with this allegation of discrimination, BellSouth has acknowledged the disproportionality, but

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(D.C. Cir. 1996) (rejecting a Commission rule regarding rate structures, even though the rule helped small interexchange carriers compete against AT&T).

⁷⁹*Non-Accounting Safeguards Order*, 14 FCC Rcd at 21999, para. 197. As the Commission has recognized, “[e]ven the slightest preference or discrimination can be highly consequential in a fast-paced competitive market.” *Non-Accounting Safeguards Recon. Order*, 12 FCC Rcd at 36221, para. 20.

⁸⁰*See, e.g.*, BellSouth Legal Analysis at 49, 77-78; BellSouth Initial Brief at 49, 69-70.

⁸¹*See Non-Accounting Safeguards Order*, 14 FCC Rcd at 21914, para. 16; at 21998, para. 197; at 22029, para. 257. *See also Access Charge Reform Order*, 11 FCC Rcd at 21437-38, para. 192; *Non-Accounting Safeguards Order*, 14 FCC Rcd at 21909, 22001, paras. 197, 202; *BellSouth 5-State Order*, 17 FCC Rcd at 17750, para. 274 & n.1061. *See also BellSouth 5-State Order*, 17 FCC Rcd at 17750, para. 274 & n.1061; *Non-Accounting Safeguards Order*, 14 FCC Rcd at 21909, 22001, paras. 197, 202; *Access Charge Reform Order*, 11 FCC Rcd at 21437-38, para. 192.

⁸²*See, e.g.*, BellSouth Initial Brief at 49-50, 69-70; BellSouth Reply Brief at 2, 5, 29-30; BellSouth Interrogatory Response No. 4.

⁸³*See* BellSouth Initial Brief at 45-50, 70, 97 (noting discounts are somewhat higher for higher volumes, 39-40, 70, and generally reflect cost savings, 51, thus making them comparable to traditional volume and term discounts, 93-94); Mims Declaration at paras. 44-45. *See also* BellSouth Answer at 2, 17, 19-20, 66-69, 72; BellSouth Legal Analysis at 2-3, 38-40, 67-69; Mims Declaration at paras. 28, 35, 44-46, 48-51, 72, 78-80; BellSouth Initial Brief at 32-33, 35-36, 39, 44-45, 48-51, 59-62, 70, 93-94, 105; BellSouth Reply Brief at 8-9, 33-35, 53-56; BellSouth Interrogatory Response No. 1 at 2-3; BellSouth Interrogatory Response No. 4, Attachment A.

⁸⁴*See, e.g.*, BellSouth Initial Brief at 48-49, 62-70; BellSouth Reply Brief at 54-55, 60.

⁸⁵BellSouth Initial Brief at 48-49. *See* BellSouth Legal Analysis at 11, 70-78; BellSouth Answer, Tab 4, Declaration of Dennis W. Carlton and Hal S. Sider on Behalf of BellSouth Telecommunications, Inc. (“Carlton Declaration”) at 77-78; BellSouth Initial Brief at 45-50, 97; BellSouth Reply Brief at 29-30.

has proffered no cost justification for it; (ii) the discounts depart *dramatically* from a linear relationship to volume; (iii) the TSP produces a large, disproportionate benefit to BellSouth's affiliate, BellSouth Long Distance; and (iv) by BellSouth's own admission, the disproportionate nature of the discounts derives not from the discount structure alone, but from the discount structure in combination with the 90% commitment requirement – a requirement that is itself unlawful under section 272, as we explain, *infra*. Thus, this Order does not preclude disproportional special access volume discounts *per se*; we merely reaffirm the Commission's prior finding that a BOC charged with discrimination in violation of section 272 may defend its challenged tariff by, *inter alia*, providing a cost showing that justifies the rates and practices.⁸⁶ Here, the disproportionality is very significant,⁸⁷ yet BellSouth has not attempted to cost-justify it.⁸⁸

33. We note that, although the Commission has, in fact, allowed LECs a substantial amount of discretion in their creation of volume discounts,⁸⁹ and has in certain contexts removed the requirement that such discounts be supported *ab initio* by cost justification,⁹⁰ the Commission has never allowed such discretion to produce discrimination favoring a BOC's affiliate.⁹¹ In addition, the Commission orders granting flexibility and allowing discretion in the creation of volume discounts concerned the reasonableness of volume discounts under sections 201(b) and 202(a),⁹² whereas in the 272 context the Commission has focused on the unqualified avoidance of discrimination, and has emphasized the primacy of cost-based pricing as a defense to an alleged violation.⁹³ In fact, even in contexts not involving section

⁸⁶See *Non-Accounting Safeguards Order*, 14 FCC Rcd at 22004-05, para. 212. For discussions of cost justification defense generally, see *Price Cap Performance Review Order for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd 8961, 9142-43 at para. 417 (1995) (discussing balance between pricing flexibility for LECs and cost justification support in a non-section 272 context); *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers Petitions for Reconsideration*, Memorandum Opinion and Order on Third Further Reconsideration, 10 FCC Rcd 1570, 1471 at para. 8 (1994) (same); *Investigation of Special Access Tariffs of Local Exchange Carriers*, Tentative Decision, 8 FCC Rcd 1059, 1079 at para. 135 (Com. Carr. Bur. 1993) (discussing departure from cost justification requirement, but reliance on cost justification as defense against discrimination in a section 202(b) context).

⁸⁷See paras. 23-27, *supra*; Mims Declaration at para. 50.

⁸⁸BellSouth's efforts to cost-justify the TSP all pertain to the 90% commitment requirement. BellSouth Answer at 69; BellSouth Legal Analysis at 1-2, 65-66; Carlton Declaration at paras. 29-30; Mims Declaration at para. 80; BellSouth Initial Brief at 6, 50-51, 56-60, 62-63; BellSouth Reply Brief at 37-38, 55-56; BellSouth Interrogatory Response No. 1.

⁸⁹See *Pricing Flexibility Order*, 14 FCC Rcd at 14291, para. 127; *Access Charge Reform Order*, 11 FCC Rcd at 21437, paras. 190-91; *Fourth Transport Rate Order*, 10 FCC Rcd at 12984, para. 13 (citing *Expanded Interconnection Order*, 7 FCC Rcd 7369 at 7463, para. 199); *LEC Performance Review Order*, 10 FCC Rcd at 9042-43, para. 417; *Transport Rate Order*, 10 FCC Rcd at 3078-79, 3083, paras. 105, 114; *Volume Discount Order*, 97 F.C.C. 2d at 947, 948, paras. 38, 40. See also BellSouth Legal Analysis at 40-41, 43-44; BellSouth Initial Brief at 63-67; BellSouth Reply Brief at 54-55, 60.

⁹⁰See *Pricing Flexibility Order*, 14 FCC Rcd at 14291, para. 127; *TSP Public Notice*, 14 FCC Rcd at 6199. See also BellSouth Initial Brief at 63-67; BellSouth Reply Brief at 54-55, 60.

⁹¹See generally *Non-Accounting Safeguards Order*, 14 FCC Rcd at 22000, para. 197.

⁹²See *Pricing Flexibility Order*, 14 FCC Rcd at 14291, para. 127; *Access Charge Reform Order*, 11 FCC Rcd at 21437, paras. 190-91.

⁹³*Non-Accounting Safeguards Order*, 14 FCC Rcd. at 22004-05, para. 212 (discussing section 272(c)(1)). Contrary to BellSouth's suggestion otherwise, BellSouth Initial Brief at 49, the Commission's refusal to require BOCs to charge their affiliates a price per unit of traffic that reflects the highest unit price charged under a volume discount plan does not support BellSouth's position here. *Non-Accounting Safeguards Order*, 14 FCC Rcd at 22028-29, para. 257. Indeed, that refusal reflects the same preference for cost-based pricing that we demonstrate here.

272, the Commission has reiterated the need to avoid departures from cost that foster anti-competitive discrimination.⁹⁴

2. The TSP's 90% commitment requirement discriminates in favor of BellSouth Long Distance, in violation of section 272.

34. Although we have found the TSP's disproportional discounts to be unlawful, we cannot decline to evaluate also the TSP's 90% commitment requirement. Indeed, BellSouth urges us to view the TSP as a whole, and that the TSP's 90% commitment requirement and the discount structure are inseparable. Specifically, BellSouth states that, but for the TSP's 90% commitment requirement, BellSouth could not and would not have skewed the TSP's discounts in favor of smaller customers (including BellSouth Long Distance).⁹⁵

35. This statement by BellSouth demonstrates the unlawfulness of the 90% commitment requirement under section 272. As just explained above, we conclude that the TSP's discounts discriminate unlawfully under section 272. It follows, therefore, that the TSP's 90% commitment requirement is likewise unlawful under section 272, as an inextricable component of the discriminatory effect.

36. Furthermore, AT&T alleges that the TSP's 90% commitment requirement, in itself, violates section 272 by favoring smaller, growing customers, such as BellSouth Long Distance, over larger, established customers, such as AT&T.⁹⁶ AT&T adds that BellSouth's recent closure of the TSP to all but existing customers exacerbates this discrimination by precluding some existing and potential competitors of BellSouth Long Distance from obtaining the higher discounts that BellSouth Long Distance enjoys.⁹⁷ AT&T also contends that the TSP's evergreen provision further exacerbates the discrimination by allowing BellSouth Long Distance to maintain its access to the higher discounts indefinitely.⁹⁸ For the following reasons, we agree with AT&T that the 90% commitment requirement has unlawful flaws under section 272, independent of its relationship to the skewed discount levels.

37. In certain material ways the TSP's 90% commitment requirement resembles a so-called "growth discount," which the Commission has consistently rejected.⁹⁹ A growth discount is a pricing

⁹⁴See *Pricing Flexibility Order*, 14 FCC Rcd at 14290, para. 125; *Access Charge Reform Order*, 11 FCC Rcd at 21437, paras. 190, 192; *Price Cap Local Exchange Carrier Performance Review*, First Report and Order, 10 FCC Rcd 8961, 9042-43 at para. 417 (1995) (subsequent history omitted); *Volume Discount Order*, 97 F.C.C. 2d 923 at 947, 948, paras. 38, 40. We note that, pursuant to section 272(f) of the Act, 47 U.S.C. §272(f), the obligations imposed on BellSouth by section 272(c)(1) may begin to sunset in mid-2005 (e.g., in Georgia and Louisiana on May 15, 2005, absent a Commission order extending the applicable period), but the obligations imposed by section 272(e)(3) will not. Specifically, the obligations of section 272(e)(3) will continue to apply (i) to BellSouth Long Distance, as long as it exists as a separate section 272 affiliate of BellSouth, and (ii) to BellSouth, if and when it integrates BellSouth Long Distance and uses special access for the provision of its own services.

⁹⁵BellSouth Legal Analysis at 2, 19-20; Mims Declaration at para. 45; BellSouth Initial Brief at 52, 58-60, 62-63; BellSouth Reply Brief at 31-33; 54-55.

⁹⁶Complaint at 8, 55-62; Reply at 12, 14-17, 40-44; Mayo Reply Affidavit at paras. 20-21, 48-50; AT&T Initial Brief at 156-63; AT&T Reply Brief at 3, 58-60, 72-76.

⁹⁷Complaint at 9-10, 35-36, 42; Mayo Affidavit at para. 67; Huels Affidavit at para. 27; Reply at 16, 20-21; AT&T Initial Brief at 6-7, 111, 134-35, 163; AT&T Reply Brief at 6, 7, 8, 39-40, 80, 89; *but see* BellSouth Reply Brief at 28-29.

⁹⁸Complaint at 9, 55-57, 59, 61; Mayo Affidavit at para. 67; Reply at 20-21; AT&T Reply Brief at 41, 47-49.

⁹⁹See *BellSouth 5-State Order*, 17 FCC Rcd at 17748, para. 272; *Pricing Flexibility Order*, 14 FCC Rcd at 14294, para. 135; *Access Charge Reform Order*, 11 FCC Rcd at 21437-38, para. 192; *Fourth Transport Rate Order*, 10 FCC Rcd at 12986, para. 17; *Transport Rate Order*, 10 FCC Rcd at 3083, at para. 114. We recognize that the analogy to growth discounts is not perfect (e.g., growth discounts apply to volume above past levels, while the TSP's discounts

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plan under which an incumbent LEC offers either (i) reduced per-unit access service prices to customers that commit to purchase a certain percentage above their past usage, or (ii) reduced prices based on growth in traffic placed over the incumbent LEC's network.¹⁰⁰ The Commission has stated that such "[g]rowth discounts violate [section 272] because they offer reduced prices based on growth in interexchange traffic, and they therefore create 'an artificial advantage for BOC long distance affiliates with no subscribers, relative to existing IXC's and other new entrants.'"¹⁰¹ In other words, growth discounts unlawfully discriminate in favor of BOC affiliates, "because BOC affiliates will begin with existing relationships with end users, name recognition, and no subscribers, [and thus] they will grow much more quickly than existing IXC's and other new entrants. . . ."¹⁰² This unique capacity for expansion appears to place BOC affiliates in a unique position to qualify for and benefit from growth discounts.

38. Similarly here, given BellSouth Long Distance's rapid and substantial growth,¹⁰³ and that much of its future growth will likely derive from business won from existing competitors rather than from new demand,¹⁰⁴ the 90% commitment requirement unlawfully favors BellSouth Long Distance over its established competitors under section 272.¹⁰⁵ Specifically, BellSouth Long Distance will continue to qualify readily for the TSP's discounts throughout its five-year term and as the annual renewal periods arrive; meanwhile, BellSouth Long Distance's established competitors will likely come to lack the volume needed to qualify for renewing the TSP, or incur significant shortfall penalties, as they lose business to BellSouth Long Distance or others. In addition, Bell South Long Distance's "headroom," *i.e.*, the excess of its total qualifying volume over its Committed Volume Level, [Confidential Information regarding BellSouth Long Distance's headroom]; at the same time, even established competitors who continue to qualify for renewing the TSP will likely experience diminishing headroom and, thus, diminishing flexibility in how they manage that traffic, as they lose business to BellSouth Long Distance or others.¹⁰⁶ Moreover, BellSouth's recent limitation on the TSP's availability exacerbates the foregoing effects, because existing TSP customers whose volumes are stagnant or declining no longer have the

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apply to volume below past levels); nevertheless, for the reasons described in this Order, it is sufficiently close to be instructive.

¹⁰⁰See, e.g., *Pricing Flexibility Order*, 14 FCC Rcd at 14294, para. 134 (citing *Access Reform Order*, 11 FCC Rcd at 21437).

¹⁰¹*BellSouth 5-State Order*, 17 FCC Rcd at 17749, para. 272 (citing section 272(c)(1) and (e)(3) and quoting *Pricing Flexibility Order*, 14 FCC Rcd at 14294, para. 134).

¹⁰²*Access Charge Reform Order*, 11 FCC Rcd at 21437-38, para. 192.

¹⁰³In the period from 2002 to 2004, BellSouth Long Distance's total qualifying volume [Confidential Information regarding BellSouth Long Distance's total qualifying volume], while that of its largest competitors [Confidential Information regarding certain large carriers' total qualifying volume]. BellSouth Interrogatory Response No. 4, Tab A.

¹⁰⁴In this same 2002-2004 period, BellSouth's TSP-eligible revenues [Confidential Information regarding BellSouth's TSP-eligible revenues]. *Id.*

¹⁰⁵We recognize that our conclusion that the TSP's 90% commitment requirement is akin to growth discounts -- and thus unlawful under section 272 -- rests partially on our assessment of current market conditions and predictive judgments about future conditions in a notoriously volatile market. It is well settled, however, that the Commission may rely on its predictive judgment regarding matters within its expertise. See generally *Sioux Valley Regional Television, Inc. v. FCC*, 349 F.3d 667, 679 (D.C. Cir. 2003); *Consumer Electronics Assoc. v. FCC*, 347 F.3d 291, 300, 303 (D.C. Cir. 2003); *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1133 (D. C. Cir. 2001); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999); *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221-22 (D.C. Cir. 1999) (subsequent history omitted); *Melcher v. FCC*, 134 F.3d 1143, 1151-52 (D.C. Cir. 1998).

¹⁰⁶[Confidential Information regarding TSP customers' headroom and revenue trends]. See AT&T Initial Brief at 83; BellSouth Reply Brief at 51-52; BellSouth's Interrogatory Response No. 4, Tab A. [Confidential Information regarding TSP customers' headroom and revenue trends]. BellSouth's Response to Interrogatory No. 4, Tab A. [Confidential Information regarding TSP customers' headroom and revenue trends]. *Id.*

option of allowing their terms to lapse, waiting six months, and then re-subscribing at a lower Committed Volume Level.¹⁰⁷ Therefore, even though the TSP does not require a customer to grow in order to obtain discounts, the TSP still favors the predictably fast and substantial growth of BellSouth Long Distance, in violation of section 272.¹⁰⁸

39. BellSouth argues that it could not have designed the 90% commitment requirement in order to favor BellSouth Long Distance, because BellSouth filed the TSP in April 1999, whereas BellSouth Long Distance did not subscribe to the TSP until 2001, and did not obtain authorization to start providing service until 2002.¹⁰⁹ BellSouth's argument is unavailing. As described above, liability under section 272 hinges on effect, not intent (although evidence of intent might be probative of effect). Thus, whether BellSouth designed the TSP intentionally to benefit BellSouth Long Distance is irrelevant.¹¹⁰ In any event, BellSouth created BellSouth Long Distance in 1996; BellSouth had twice applied for authority to provide long distance service by April 1999; and obtaining authority to provide long distance authority was a principal "carrot" for the BOCs in the 1996 Act. Therefore, BellSouth's assertion that it designed the TSP without BellSouth Long Distance in mind is unpersuasive.

¹⁰⁷Complaint at 35-36; Complaint Tab H, BellSouth Tariff FCC No. 1, sections 2.4.8 (E)(1), (4), and (10) (the current tariff, as modified in June 2004); Answer Tab 9 B, BellSouth Tariff FCC No. 1, section 2.4.8 (E)(11) (the tariff as filed March 22, 1999); AT&T Initial Brief at 111, 135; Mayo Affidavit at para. 67.

¹⁰⁸BellSouth argues that the analogy to growth discounts must fail because growth discounts require the customer to commit demand as to which the carrier has not yet sunk any investment, whereas the TSP's 90% commitment requirement encourages customers to continue using facilities that BellSouth has already built for the customers' use. Thus, in BellSouth's view, the latter is cost-justified, while the former is not. BellSouth Legal Analysis at 6-7, 41-47; BellSouth Initial Brief at 36-38, 68-69. BellSouth's argument is unpersuasive, however. First, the TSP does not necessarily encourage a customer to continue using facilities that BellSouth has already built for the customer's use. A customer can, and inevitably does, meet its 90% commitment requirement through a shifting range of purchases, as its retail customer base churns and changes. That is, TSP customers secure new facilities and abandon old ones, and the TSP's discounts are not linked to particular facilities. Moreover, BellSouth has presented no evidence that it cannot recover, and has not recovered, its facility investments at the time customers sign up for or renew their TSP subscriptions. See Reply at 3, 12-13, 35-38, 41-42; AT&T Initial Brief at 4, 139-40, 150-51; AT&T Reply Brief at 3, 65, 68-70.

¹⁰⁹See BellSouth Legal Analysis at 77-78; BellSouth Initial Brief at 45-46, 49 n.142; BellSouth Reply Brief at 2, 5, 29-30. See also Huels Affidavit at 2; www.bellsouthcorp/policy/transactions/tariffsum/vtml.

¹¹⁰Also irrelevant is the fact that the Commission denied petitions to suspend or investigate the TSP. BellSouth Answer, Tab 2, Legal Analysis, at 37-38 (citing *TSP Public Notice*, 14 FCC Rcd 6199). It is well-established that such Commission action does not preclude a subsequent challenge to the tariff on the same grounds under section 208 of the Act. See, e.g., *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12406, 12428 at para. 45 (1996); *Bell Atlantic Telephone Companies*, Memorandum Opinion and Order, 8 FCC Rcd 2732, 2733 at para. 7 (1993) ("*Bell Atlantic Order*"); *Policy and Rules Concerning Rates for Dominant Carriers*, Notice of Proposed Rulemaking, 2 FCC Rcd 5208, 5209 at para. 7 (1987); *In the Matter of AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 604 and 628*, Memorandum Opinion and Order, 2 FCC Rcd 548, 550 at para. 14 (1987); *AT&T Communications Revisions to Tariff F.C.C. Nos. 1, 9 and 10, Transmittal Nos. 434 and 435*, Memorandum Opinion and Order on Reconsideration, 1 FCC Rcd 930, 931 at para. 10 (1986); *Bell Atlantic Co. Tariff F.C.C. No. 1*, Order on Reconsideration, 7 FCC Rcd 5271, 5272 at para. 7 (Com. Carr. Bur. 1992) ("*Bell Atlantic Recon Order*"); *In the Matter of American Telephone and Telegraph Co. Revisions to Tariff F.C.C. No. 1, Transmittal No. 1105*, Order on Reconsideration, 3 FCC Rcd 3572, 3572 at para. 3 (Com. Carr. Bur. 1988); *In the Matter of Southwestern Bell Telephone Company Transmittal Nos. 1537 and 1560 Revisions to Tariff F.C.C. No. 68*, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2339 at paras. 6-7 (Com. Carr. Bur. 1988) (subsequent history omitted). BellSouth's reliance on *NYNEX Tel. Cos. Revision to Tariff F.C.C. No. 1, Trans. Nos. 311, 314 and 350*, Order, 9 FCC Rcd 7832 (Com. Carr. Bur.-Tar. Div. 1994) ("*NYNEX*") is likewise misplaced, because the Commission there simply denied petitions to suspend or investigate the tariff at issue. Moreover, that tariff differed materially from the TSP by allowing the customer to choose the amount of volume to commit to the plan. *NYNEX*, 9 FCC Rcd at 7832, para. 1; AT&T Reply Brief at 65-67.

40. BellSouth maintains that the 90% commitment requirement is cost-justified because it facilitates network utilization and planning and ensures recovery of costs incurred to build and maintain facilities for each TSP customer.¹¹¹ The Commission has never before adopted this customer-retention theory of cost justification. Carried to its logical conclusion, this theory would “justify” a 100% commitment requirement. We need not approve or reject this theory *per se*, however, because BellSouth has provided no actual evidence that it has not already recovered its facilities costs or cannot recover its facilities costs through means other than discriminating in favor of BellSouth Long Distance. In other words, even assuming, *arguendo*, that BellSouth’s theory could prevail, it fails here for lack of proof.

41. Finally, BellSouth contends that the 90% commitment requirement (as well as the skewed discount levels) cannot violate section 272, because the TSP is available to all existing customers on the same terms.¹¹² Even assuming, *arguendo*, that the TSP is facially neutral, BellSouth’s contention lacks merit, because it assumes incorrectly that facial neutrality equates to lawfulness. We must examine the actual effect of the tariff’s terms to determine whether unlawful discrimination exists. As the Commission has recognized, “a BOC may have an incentive to offer tariffs that, *while available on a non-discriminatory basis*, are in fact tailored to its affiliate’s specific size, expansion plans, or other needs.”¹¹³ Indeed, the Commission has rejected growth discounts under section 272, even though such discounts appeared in the context of a facially neutral tariff.¹¹⁴ The TSP is likewise unlawful, even assuming it appears in the context of a facially neutral tariff, for all of the reasons stated above.

42. Similarly, though BellSouth asserts that it recently closed the TSP to new customers to address AT&T’s concerns,¹¹⁵ and that AT&T cannot logically claim additional injury from this limitation on the very plan it attacks as discriminatory,¹¹⁶ in fact the discriminatory impact of the TSP is exacerbated by both the TSP’s evergreen provision and its newly limited availability, singly and in combination. First, the evergreen provision continues indefinitely the discount benefits for any current customer that can maintain its commitment level.¹¹⁷ As discussed herein, that effect favors small and growing companies, including BellSouth Long Distance, over BellSouth Long Distance’s larger competitors. Thus, over time, BellSouth Long Distance will have a growing edge over its larger competitors. Moreover, the absence of the TSP as an option for those who are currently not TSP customers creates a perpetual advantage for BellSouth Long Distance over those customers, because the TSP’s overlay discounts exceed all other discounts available to those customers. In addition, the recent closure of TSP to “new” customers deprives even existing customers of an option they had previously: terminating their terms or allowing their terms to lapse, waiting six months, and then re-subscribing to the TSP at a lower

¹¹¹ See BellSouth Initial Brief at 58 (noting its goal of “ensuring relatively high usage of BellSouth’s deployed facilities, which thus continue to earn a return on the investment made on behalf of that customer”). See also BellSouth Legal Analysis at 65-66, 69; Carlton Declaration at paras. 29-30; Mims Declaration at paras. 44, 80, 96; BellSouth Initial Brief at 6, 50-51, 56-59, 62-63; BellSouth Reply Brief at 14, 31-32, 37-38, 55-56; BellSouth Interrogatory Response No. 1; *but see* BellSouth Initial Brief at 56 (noting that TSP customers may use any combination of services and facilities in meeting their Committed Volume Levels). Supporting this view of non-specific facility use, see *generally* Reply at 12; Mayo Reply Affidavit paras. 18-19 & n.2; AT&T Initial Brief at 39, 51-52, 124-27, 132-34; AT&T Reply Brief at 50-52.

¹¹² BellSouth Legal Analysis at 71, 76; BellSouth Initial Brief at 31-32, 43-44, 47-48; BellSouth Reply Brief at 24-26; BellSouth Interrogatory Response No. 1.

¹¹³ *Non-Accounting Safeguards Order*, 14 FCC Rcd at 22028-29, para. 257 (discussing section 272(e)(3)) (emphasis added).

¹¹⁴ *Access Charge Reform Order*, 11 FCC Rcd at 21437, para. 192.

¹¹⁵ BellSouth Legal Analysis at 4, 32.

¹¹⁶ BellSouth Reply Brief at 28.

¹¹⁷ Joint Statement at para. 18; *but cf.* BellSouth Reply Brief at 12-13, 19-20, 28-29 (arguing that the evergreen provision was developed at the request of TSP customers, including AT&T).

Committed Volume Level.¹¹⁸ That option might have been especially attractive to BellSouth Long Distance's larger competitors, whose volumes are stagnant or declining.

* * * * *

43. AT&T claims that the TSP violates sections 201(b) and 202(a) of the Act, as well as section 272. Because we find the TSP unlawful under section 272, and because we award AT&T under section 272 all the injunctive relief to which it would be entitled under sections 201(b) and 202(a),¹¹⁹ we need not reach those claims and thus dismiss them without prejudice.

B. Neither the Statute of Limitations Nor Equitable Estoppel Bars AT&T's Complaint.

44. Section 415(b) of the Act provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages . . . shall be filed with the Commission within two years from the time the cause of action accrues, and not after."¹²⁰ BellSouth argues that section 415(b) bars AT&T's Complaint because the causes of action therein accrued on April 6, 1999, when the TSP became effective, which predates the filing of the Complaint by more than five years.¹²¹ We disagree, for the following reasons.

45. The Commission has repeatedly held that the two-year statute of limitations in section 415(b) applies only to claims for damages, and not to claims for prospective relief.¹²² AT&T's Complaint seeks prospective relief as well as damages.¹²³ Therefore, section 415(b) does not bar AT&T's Complaint. Moreover, we need not decide in this Order whether or to what extent section 415(b) limits AT&T's ability to recover damages, because AT&T "bifurcated" its damages request from its liability and prospective relief requests pursuant to section 1.722(d) of our rules, 47 C.F.R. § 1.722(d).¹²⁴ We will address those questions if and when AT&T files a supplemental complaint for damages.¹²⁵

¹¹⁸Complaint Tab H, BellSouth Tariff FCC No. 1, sections 2.4.8 (E)(1), (4), and (10) (the current tariff, as modified in June 2004); Answer Tab 9 B, BellSouth Tariff FCC No. 1, section 2.4.8 (E)(11) (the tariff as filed March 22, 1999); Complaint at 36; Mayo Affidavit at para. 67; AT&T Initial Brief at 111, 135.

¹¹⁹See Part III. C, *infra*. Moreover, we have no reason to believe that AT&T's right to damages, if any, would be any different for liability arising under sections 201(b) and 202(a) than under section 272.

¹²⁰47 U.S.C. § 415(b).

¹²¹BellSouth Answer at 22; BellSouth Legal Analysis at 5, 32-36; BellSouth Initial Brief at 26-30; BellSouth Reply Brief at 68-69.

¹²²See, e.g., *AT&T v. Winback & Conserve Program, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16074, 16081 at n.53 (2001) ("*Winback*") ("Section 415(b) applies only to claims for damages."); *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 654, 670 at para. 30 (1995) (affirming a Bureau order because "the Bureau did not find that ACC's entire complaint, including its requests for declaratory rulings, is barred by the statute of limitations in Section 415 of the Act.") (subsequent history omitted); *Bunker Ramo Corp. v. Western Union Telegraph*, Memorandum Opinion and Order, 31 F.C.C. 2d 449, 454 (Rvw. Bd. 1971) ("Section 415(b), both by its terms and as it has been construed in past proceedings, applies exclusively as a bar to the recovery of damages; it does not operate as a bar to other forms of relief.") (subsequent history omitted); *Municipality of Anchorage v. Alascom, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 2472, 2465 at para. 25 (Com. Carr. Bur. 1989) ("*Anchorage v. Alascom*"). See generally *Heritage Cablevision v. Texas Utilities Electric Co.*, Memorandum Opinion and Order, 6 FCC Rcd 7099, 7106 at para. 36 (1991) (noting that "Section 415(b) does not limit our ability to redress harm caused by longstanding misconduct such as this on a prospective basis.").

¹²³Complaint at 68-69.

¹²⁴Complaint at 2, para. 2.

¹²⁵*Compare* Complaint at 68; AT&T Supplement at 6-9; Reply at 24-26, with BellSouth Answer at 22; BellSouth Legal Analysis at 32-36; BellSouth Initial Brief at 26-28 (taking opposing views on when AT&T's damages claims

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46. According to BellSouth, we should not follow the Commission orders holding that section 415(b) applies only to claims for damages, because court decisions and other Commission orders have stated that the running of the statute of limitations in section 415(b) (and its counterpart in the Interstate Commerce Act) “not only bars the remedy, but destroys the liability.”¹²⁶ In BellSouth’s view, that phrase means that no part of a complaint – not even a claim seeking a liability determination for the purpose of obtaining prospective relief – survives if a damages claim therein is barred by section 415(b).¹²⁷

47. BellSouth places more weight on that phrase than it can bear. First, BellSouth’s interpretation contradicts the plain language of section 415(b), which by its clear terms applies to “complaints against carriers *for the recovery of damages*. . . .”¹²⁸ In addition, none of the cases in which that phrase appears involved a situation where, as here, the complaint sought both damages and prospective relief. Therefore, the phrase about “destroying” liability was not designed, as BellSouth would have it, to “destroy” claims for prospective relief along with claims for damages. Indeed, upon close examination of the cases, it appears that the phrase was designed, instead, solely to emphasize that the limitations period in section 415(b) cannot be waived or tolled in the absence of extraordinary circumstances, because the limitations period plays an important role in achieving the Act’s goals of preventing discrimination and ensuring prompt payment of carrier charges.¹²⁹ Allowing a claim for prospective relief to proceed, even while a related claim for damages is time-barred, would not undermine either of those goals. Consequently, where, as here, a complaint seeks both damages and prospective relief regarding circumstances that continue to exist when the complaint is filed, section 415(b) does not apply to the prospective relief portion of the complaint.

48. That said, a complainant cannot sit on its alleged right to prospective relief indefinitely. As the Commission has observed, if a complainant “delay[s] unreasonably in bringing its claims for declaratory and injunctive relief, we have discretion to dismiss those claims on equitable grounds.”¹³⁰

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accrued). For the same reasons, we need not and do not decide in this Order whether 47 U.S.C. § 204(a)(3) bars all, or only part, of AT&T’s entitlement to seek recovery of any damages. Compare BellSouth Legal Analysis at 37-38; BellSouth Initial Brief at 9, 11-12 (arguing that section 204(a)(3) bars retrospective (but not prospective) relief and thus eliminates all of AT&T’s entitlement to damages, if any), with AT&T Reply Brief at 78-79 (acknowledging that section 204(a)(3) does bar its recovery of some of its alleged damages, but not all such damages).

¹²⁶*Armstrong Utilities, Inc. v. General Telephone Co. of PA*, Memorandum Opinion, Order, and Temporary Authorization, 25 F.C.C. 2d 385, 389 at para. 11 (1970) (“*Armstrong*”) (subsequent history omitted). See *MCI Telecommunications Corp. v. Pacific Tel. Co. of PA*, Memorandum Opinion and Order, 12 FCC Rcd 13243, 13252 at para. 15 (1997) (subsequent history omitted); *Michael J. Valenti and Real Estate Marketplace v. AT&T Co.*, Memorandum Opinion and Order, 12 FCC Rcd 2611, 2621 at para. 24 (1997) (“*Valenti*”); *Tele-Valuation, Inc. v. AT&T Co.*, Memorandum Opinion and Order, 73 F.C.C. 2d 450, 451 at para. 6 (1979) (“*Tele-Valuation v. AT&T*”); *MCI Telecommunications Corp. v. Northwestern Bell Tel. Co.*, Order to Show Cause, 4 FCC Rcd 6096, 6097-98 n.8 (Com. Car. Bur. 1989) (“*MCI v. Northwestern Bell*”); *Anchorage v. Alascom*, 4 FCC Rcd at 2473, para 14; *Mid-State Horticultural Co. v. Pennsylvania Railway*, 320 U.S. 356, 364 (1943) (“*Mid-State*”); *A.J. Phillips Co. v. Grand Trunk W. Railway Co.*, 236 U.S. 662, 667 (1915) (“*Grand Trunk*”); *Ward v. Northern Ohio Telephone Co.*, 251 F. Supp. 606, 609 (N.D. Ohio 1966), *aff’d*, 381 F. 2d 16 (6th Cir. 1967).

¹²⁷See BellSouth Legal Analysis at 32-35; BellSouth Initial Brief at 28-29.

¹²⁸47 U.S.C. § 415(b) (emphasis added).

¹²⁹See *Valenti*, 12 FCC Rcd at 2621-22, para. 24; *Tele-Valuation v. AT&T*, 73 F.C.C. 2d at 451, para. 6; *Armstrong*, 25 F.C.C. 2d at 389, para. 11; *MCI v. Northwestern Bell*, 4 FCC Rcd at 6097-98, n.8; *Mid-State*, 320 U.S. at 367; *Grand Trunk*, 236 U.S. at 667.

¹³⁰*Winback*, 16 FCC Rcd at 16081, n.53. See *Black Radio Network v. New York Telephone Co.*, Memorandum Opinion and Order, 12 FCC Rcd 13737 at 13748, n.40 (Com. Carr. Bur. 1997) (noting that “even in the absence of a damage claim, the Bureau is always concerned with the timeliness of complaints. We will not hesitate to dismiss

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49. BellSouth asserts that such equitable grounds for dismissal of AT&T's Complaint exist here.¹³¹ To support that assertion, BellSouth points out principally that (i) AT&T filed its complaint over five years after knowing fully about the terms of the TSP on which AT&T's Complaint largely, if not exclusively, focuses;¹³² and (ii) two years after the TSP became available, and three years before AT&T filed its Complaint, AT&T [Confidential Information regarding AT&T business decision.]¹³³

50. BellSouth's argument has some persuasive force. Nevertheless, on the particular facts here, we decline to exercise our discretion to dismiss AT&T's Complaint on equitable grounds. Some of the relevant events occurred more recently than five years ago, *e.g.*, the addition of the evergreen provision in 2001, and the preclusion of new customers (including current or former customers re-subscribing at lower Committed Volume Levels) in 2004. As explained above,¹³⁴ these actions exacerbate the TSP's unlawful discrimination in favor of BellSouth Long Distance.¹³⁵ Furthermore, since the TSP began, certain changes in the marketplace – including the ‘bursting’ of the ‘Internet bubble,’ and the substitution of wireless and VoIP¹³⁶ services for traditional long distance services – have substantially dampened demand for special access services in recent years,¹³⁷ which renders the TSP's illegalities more acute.¹³⁸ Moreover, BellSouth has pled or argued neither that it detrimentally relied on the absence of any challenge to the TSP's legality, nor that AT&T has failed to meet its commitments under the TSP; thus, BellSouth has received the benefit of its bargain to date.¹³⁹ Finally, the Complaint raises issues of exceptional importance going to the core of the Commission's mission of protecting the public interest.

51. We caution, however, that neither AT&T nor any other prospective complainant should view this decision as condoning lassitude in the filing of complaints seeking prospective relief. To avoid the risk of dismissal, such complaints should be brought without undue delay.

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causes of action as untimely when considerations of equity so require.”). *But cf. AT&T, MCI v. Bell Atlantic – PA*, Memorandum Opinion and Order, 14 FCC Rcd 556, 566 at para. 18 (1998) (“*AT&T v. Bell Atlantic PA*”) (declining to dismiss a complaint as untimely on equitable grounds, because the defendants failed to cite specific authority supporting such a dismissal).

¹³¹BellSouth Answer at 22; BellSouth Legal Analysis at 32-36; BellSouth Initial Brief at 26-30.

¹³²BellSouth Answer at 22; BellSouth Legal Analysis at 33, 34; BellSouth Initial Brief at 26-27.

¹³³BellSouth Legal Analysis at 3-4, 22-25, 36; Joint Statement at para. 29; BellSouth Initial Brief at 2-3, 26, 27, 30, 37-38, 74, 78-79, 81-82, 84; BellSouth Reply Brief at 11, 23-24, 27, 48, 61. BellSouth also observes that: (i) but for [Confidential Information regarding AT&T business decision and subsequent events], eliminating any competitive or financial harm that the TSP allegedly causes AT&T today, BellSouth Initial Brief at 2-3, 30; BellSouth Reply Brief at 11; (ii) given that the TSP existed for years without legal challenge, other TSP customers and potential customers have formed business plans based on the continued availability of the TSP, BellSouth Initial Brief at 21-22; (iii) some of the evils that statutes of limitation are designed to prevent have occurred in this proceeding -- specifically, potentially relevant witnesses and documents that might have been available had the complaint been filed sooner were not available, BellSouth Reply Brief at 35-36; and (iv) AT&T has [Confidential Information regarding the amount of TSP discounts received by AT&T], BellSouth Interrogatory Response No. 4, Tab A; BellSouth Initial Brief at 30; BellSouth Reply Brief at 11.

¹³⁴See para. 42, *supra*.

¹³⁵We do not, in our discussion here, make any determination about when AT&T's claim for damages accrued under section 415(b).

¹³⁶Voice over Internet Protocol (“VoIP”).

¹³⁷For example, from 2002 to 2004, BellSouth's TSP-eligible revenue [Confidential Information regarding BellSouth revenues]. BellSouth Interrogatory Response No. 4.

¹³⁸Complaint at 15-17 & n.40, 22, 45, 58-59; Huels Affidavit at paras. 11-16; Mayo Affidavit at paras. 6, 33-34; Mayo Reply Affidavit at para. 5; AT&T Initial Brief at 48, 82-85; AT&T Interrogatory Response No. 1 at 17-19.

¹³⁹See, *e.g.*, *AT&T v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312 (2001) (“*AT&T v. BTI*”) (subsequent history omitted).

C. The Discrimination Caused by the TSP Is Appropriately Redressed Through Removal of the Evergreen Provision and, After a Reasonable Period, Termination of the TSP.

52. Upon a finding of liability, AT&T seeks a Commission order (i) striking the 90% commitment requirement; (ii) striking the requirement that a customer maintain its initial (or higher, in the case of a voluntary increase) Committed Volume Level for the term of the plan, thereby allowing existing TSP customers to re-select their Committed Volume Levels (and associated discount); (iii) requiring BellSouth to reopen the TSP, as revised, to new customers; and (iv) leaving the remainder of the TSP intact.¹⁴⁰ BellSouth argues that such a remedy would amount to an unjustified and unauthorized prescription of a new tariff.¹⁴¹

53. For the reasons discussed below, we grant in part and deny in part AT&T's requested relief.¹⁴² We direct BellSouth to strike the TSP's evergreen provision immediately, so that no TSP customer may further extend its term,¹⁴³ and we direct BellSouth to terminate the TSP entirely on June 9, 2005, six months after the release date of this Order.¹⁴⁴

54. Under sections 4(i) and 208 of the Act,¹⁴⁵ the Commission has broad discretion to fashion an injunctive remedy for a violation of the Act, much like a court under similar circumstances.¹⁴⁶ In exercising that discretion, we consider the totality of the circumstances to determine a just and fair result. Here, the relevant circumstances include (i) the nature and extent of the violation; (ii) the expectations and reliance of the parties; (iii) the expectations and reliance of non-party subscribers of the TSP; and (iv) the nature of the TSP.

55. In light of section 272's unqualified prohibition of discrimination in favor of a BOC affiliate, and the significant extent of such discrimination found here, the TSP must end, and end soon. There are [Confidential Information identifying the number of TSP customers] non-parties who are TSP customers, however, and they likely have formed some business expectations regarding the continued availability of the TSP's substantial discounts, especially because the TSP has been in place for over five years. On balance, therefore, we conclude that existing TSP customers should be allowed to continue their participation until their present terms expire, or until six months from the date of this Order, whichever occurs first.¹⁴⁷ This remedy ends the discriminatory conduct quickly, but somewhat

¹⁴⁰Complaint at 68-69; AT&T Supplement at 6-9; Reply at 24-26; AT&T Initial Brief at 163-73; AT&T Reply Brief at 76-92. Although AT&T seeks damages from BellSouth, in an amount to be determined in a supplemental proceeding, AT&T states that it "principally seeks other relief (declaratory, injunctive, and prescriptive) . . .". AT&T Initial Brief at 14.

¹⁴¹BellSouth Answer at 23-24, 68; BellSouth Legal Analysis at 20-21, 37-38, 78-86; BellSouth Initial Brief at 4-5, 9-11, 12-25; BellSouth Reply Brief at 9-10, 68-70.

¹⁴²Given that we find in favor of AT&T on liability, AT&T may now file a supplemental complaint for damages in compliance with 47 C.F.R. § 1.722. If BellSouth plans to seek reconsideration or court review of this Order, however, the parties may wish to seek jointly a waiver and extension of our 60-day deadline for filing such a damages complaint.

¹⁴³As a practical matter, [Confidential Information regarding the impact on TSP customers of this action].

¹⁴⁴Between now and the expiration of a TSP customer's term, the customer remains liable for any shortfall charges it may incur.

¹⁴⁵47 U.S.C. §§ 154(i), 208.

¹⁴⁶*Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, 22565-66 at para. 159 & n.464 ("Formal Complaints Rulemaking Order") (subsequent history omitted); *Bell Atlantic Order*, 8 FCC Rcd at 2733, n.8.

¹⁴⁷Both parties agree that we have authority under sections 4(i) and 272 of the Act to order this result. AT&T Supplement at 4-10; Reply at 26-28; AT&T Reply Brief at 82 n.268; BellSouth Initial Brief at 5, 8. Both parties

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ameliorates the industry disruption that might otherwise occur if the TSP were terminated immediately, *i.e.*, non-party TSP customers will have some time to adjust their business plans to account for the elimination of the TSP.¹⁴⁸

56. Assuming, *arguendo*, that we would have authority under section 205 of the Act¹⁴⁹ to afford the prescriptive relief sought by AT&T,¹⁵⁰ we decline to do so. AT&T has cited no Commission order, and we have found none, where the Commission has required a carrier to implement a plan that is optional to customers (*i.e.*, a plan concerning a service that customers can obtain via a *required*, approved tariff), and to omit from the optional plan terms but for which the carrier would never have volunteered the plan in the first place.¹⁵¹ Such a result would be unduly punitive to BellSouth. Moreover, we are not convinced that the present record contains sufficient evidence for us to conclude, as we must under section 205, that the plan that would result from the deletions and changes sought by AT&T would be “just, fair, and reasonable.”¹⁵²

57. We recognize that a potential negative result of our remedy is that special access customers in BellSouth’s region may ultimately have no volume discount option with BellSouth. Therefore, we encourage BellSouth to fashion a volume discount plan that does not suffer from the discriminatory effects identified in this Order. Indeed, one of the virtues of the remedy imposed here is that BellSouth has some time to formulate a new volume discount plan before a large number of the TSP terms conclude. If BellSouth fails to do so, that failure may be relevant evidence in determining, in other

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also agree that we have the authority to strike just the evergreen provision, so that the TSP would terminate customer-by-customer, as each reached the end of its five-year commitment or one-year extension. AT&T Supplement at 6-9; Reply at 26-28; AT&T Initial Brief at 163-67; AT&T Reply Brief at 82 n.268; BellSouth Initial Brief at 5, 6, 8. The virtue of such a result is that some TSP customers would have longer than six months to adjust to the future elimination of the TSP, thereby reducing market disruption. The vice of such a result, however, is that BellSouth Long Distance would be one of those favored TSP customers; indeed, BellSouth Long Distance would remain under the TSP until April 10, 2006, [Confidential Information regarding the remaining terms of other TSP customers], thereby perpetuating and exacerbating the very discrimination that this Order seeks to remedy. Mims Declaration, Attachment G; AT&T Initial Brief at 6-7; AT&T Reply Brief at 82 n.268. Thus, we decline to adopt this approach.

¹⁴⁸In this regard, the remedy we fashion here is analogous to the Commission’s actions in the *CLEC Access Charge Order*, *Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9924 (2001) (subsequent history omitted), and in the *ISP Remand Order*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), where the Commission ordered the gradual reduction of rates, rather than a “flashcut,” so as to minimize industry disruption (subsequent history omitted). *Cf. In the Matter of Unbundled Access to Network Elements*, Order and Notice of Proposed Rulemaking, FCC 04-179, 2004 WL 1900394, at para. 30 (Aug. 20, 2004) (“We recognize that transition plans are always imperfect, as they by definition retain -- temporarily -- aspects of the regime being discarded.”).

¹⁴⁹47 U.S.C. § 205.

¹⁵⁰See generally *National Ass’n of Motor Bus Owners v. FCC*, 460 F.2d 561, 565 (2d Cir. 1972); *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Order on Reconsideration, 17 FCC Rcd 17040, 17042-43 at para. 6 (2002) (confirming Commission’s authority to prescribe rates in a complaint proceeding); *AT&T v BTI*, 16 FCC Rcd at 12312, para. 13 (“Section 205 thus expressly authorizes the Commission to prescribe rates in the context of a complaint proceeding under section 208”); *MTS/WATS*, Report and Order, 83 F.C.C. 2d 167, 191 at paras. 70-73 (1980); *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 11233, 11236-37 at para. 8 & n.22 (1996); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Order, 60 F.C.C. 2d 261, 284-85, 321-22 at paras. 42, 130-32 (1976).

¹⁵¹See, e.g., BellSouth Legal Analysis at 67-69; Mims Declaration at paras. 45-51.

¹⁵²47 U.S.C. § 205(a).

Commission proceedings, whether the Commission's predictive judgments about the development of special access competition were accurate.

D. AT&T's Claims Against the PSIP Are Denied.

58. AT&T also claims that another of BellSouth's special access discount plans, the Premium Savings Incentive Plan ("PSIP"), violates sections 201(b), 202(a), and 272 of the Act.¹⁵³ Although the PSIP is somewhat similar to the TSP, it differs in some determinative respects. First, the PSIP has (and always will have) [Confidential Information identifying the number of PSIP customers].¹⁵⁴ Moreover, the PSIP contains no evergreen provision, and thus does not have the "perpetual" characteristic of the TSP.¹⁵⁵ Finally, BellSouth Long Distance does not and cannot subscribe to the PSIP.¹⁵⁶ Given these circumstances, we conclude that the PSIP does not unlawfully discriminate in favor of BellSouth Long Distance under section 272, and does not have an unjust or unreasonable effect on the special access market under sections 201(b) and 202(a). Accordingly, AT&T's claims concerning the PSIP are denied.

IV. ORDERING CLAUSES

59. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 201, 202, 208, and 272 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201, 202, 208, and 272, that the formal complaint filed by AT&T Corporation, Inc., against BellSouth Telecommunications, Inc. is GRANTED IN PART and is OTHERWISE DISMISSED without prejudice or DENIED, as discussed above.

60. IT IS FURTHER ORDERED, pursuant to sections 272 and 4(i) of the Act, 47 U.S.C. §§ 272 and 154(i), that BellSouth Telecommunications, Inc. SHALL REVISE its FCC Tariff No. 1, in compliance with relevant requirements of the Commission's rules, to remove the evergreen provision, BellSouth Tariff FCC No.1 § 2.4.8(E)(4), and SHALL FILE this revision no later than December 16, 2004, one week following the release of the instant Order.

61. IT IS FURTHER ORDERED, pursuant to sections 272 and 4(i) of the Act, 47 U.S.C. §§ 272 and 154(i), that BellSouth Telecommunications, Inc. SHALL TERMINATE its Transport Savings Plan ("TSP"), Tariff FCC No. 1 § 2.4.8(E), through a tariff revision filed in compliance with relevant requirements of the Commission's rules, effective June 9, 2005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁵³ Complaint at 3-10, 18-69; Reply at 1-22, 35-48; AT&T Initial Brief at 156-163; AT&T Reply Brief at 72-76.

¹⁵⁴ BellSouth Legal Analysis at 30-31; Mims Declaration at para. 94 and Attach. H.

¹⁵⁵ Joint Statement at para. 40; Mims Declaration at para. 55.

¹⁵⁶ Mims Declaration at para. 95.

Confidential Appendix

Not Included in Public Files